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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH TESTA AND ANTHONY SENTER, PETITIONERS

v.

UNITED STATES OF AMERICA

CARLO PROFETA, PETITIONER

v.

UNITED STATES OF AMERICA

DOUGLAS REGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the retrial of petitioners Testa and Senter for conspiring to violate the civil rights of a federal witness, after petitioners' first trial on that charge ended in a hung jury, violated the Double Jeopardy Clause of the Fifth Amendment.

2. Whether the RICO convictions of petitioner Profeta must be reversed because the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.

3. Whether the grand jury testimony of an unavailable government witness was admitted against petitioner Rega in violation of the Confrontation Clause of the Sixth Amendment.

4. Whether the length and complexity of the trial violated the due process rights of petitioners Testa, Senter, and Rega.

5. Whether, in order to prove that petitioners Testa and Senter conspired to violate the right of a potential federal witness to testify, in violation of 18 U.S.C. 241, the government was required to show that a federal proceeding was pending, or that Testa and Senter believed that such a proceeding might be initiated.

6. Whether the evidence was sufficient to establish that petitioner Rega's extortionate conduct affected interstate commerce under the Hobbs Act, 18 U.S.C. 1951.

7. Whether petitioner Rega received ineffective assistance of counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2060

JOSEPH TESTA AND ANTHONY SENTER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 91-8646

CARLO PROFETA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-8670

DOUGLAS REGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals filed two opinions in petitioners' post-conviction appeal, one of which (Pet.

App. 1-16)[1] is reported at 954 F.2d 839, and the other of which (Pet. App. 17-33) is an unreported summary order. The opinion of the court of appeals in the interlocutory appeal of petitioners Testa and Senter (Pet. App. 34-53) is reported at 847 F.2d 42.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1992. The petitions for rehearing were denied on March 16, 1992. The petitions for a writ of certiorari were filed on June 15, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, Testa and Senter were convicted on one count of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); one count of conspiring to violate civil rights, in violation of 18 U.S.C. 241; two counts of conspiring to make and collect extortionate extensions of credit, in violation of 18 U.S.C. 892 and 894; one count of conspiring to violate various firearm statutes, in violation of 18 U.S.C. 371; one count of conspiring to possess and distribute marijuana and cocaine, in violation of 21 U.S.C. 846; and one count of possessing and distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Testa was also convicted of extor-

[1] "Pet. App." refers to the appendix to the petition in No. 91-2060.

tion, in violation of the Hobbs Act, 18 U.S.C. 1951. Rega was convicted on the racketeering counts; the firearms conspiracy count; one count of extortion; and three counts of mail fraud, in violation of 18 U.S.C. 1341. Profeta was convicted on the RICO counts and the loansharking conspiracy counts.

The district court sentenced Testa and Senter to life imprisonment and a fine of $35,000; Rega to 40 years' imprisonment; and Profeta to 12 years' imprisonment. The court of appeals affirmed. Pet. App. 1-33.

1. The evidence at the 16-month trial showed that petitioners were members of the DeMeo Crew, a component of the Gambino organized crime family. The DeMeo Crew engaged in a vast array of illegal activities, including kidnapping, loansharking, narcotics distribution, pornography, extortion, firearms conspiracy, and the operation of an international stolen car ring. From the early 1970s to the 1980s, those activities were furthered by violence, including the murders of various individuals viewed by the Crew as a threat to its business. Pet. App. 3-4.

Testa and Senter were members of the DeMeo Crew for more than a decade and were close to the Crew's leader, Roy DeMeo. Testa eventually rose to be DeMeo's next-in-command, and Senter was Testa's constant companion. Both Testa and Senter were at the heart of the Crew's loansharking and narcotics operations, and were often called on to locate, bribe, and, if necessary, murder potential witnesses against the Crew. Testa and Senter were directly involved in at least seven murders, several of which involved the dismemberment of the victims and disposal of the body parts in trash dumpsters and landfills. Gov't C.A. Br. 8-9.

One of the DeMeo Crew's activities was exporting stolen American cars to Kuwait. Ronald Falcaro and Khaled Daoud conducted a competing, but legitimate, cars-to-Kuwait venture. Daoud came to suspect that the DeMeo operation involved stolen cars, and he began recording the Vehicle Identification Numbers of cars in the DeMeo inventory. Ronald Ustica, the leader of the DeMeo stolen car scheme, observed Daoud doing this. Thereafter, Falcaro and Daoud were lured to a garage in Brooklyn and murdered by a group of men that included Testa and Senter. Pet. App. 12.

Rega ran a lucrative business for the Crew involving the duplication and distribution of pornographic movies. He copied the films in a building owned by his uncle, Fred Todaro, who also was involved in the pornography business. After a dispute arose between Rega and Todaro concerning the ownership of the building and its laboratory equipment, each man filed a lawsuit against the other. After being served with papers in Todaro's lawsuit, Rega, with the assistance of another man, attempted to kidnap Todaro, but Todaro escaped capture. Ultimately, Fred DiNome murdered Todaro at DeMeo's direction. One week later, Rega paid DeMeo $10,000 for the murder. Thereafter, Rega's attorney filed papers moving for dismissal of Todaro's lawsuit on the ground that Todaro had abandoned the litigation. Gov't C.A. Br. 43-46.

Profeta served as DeMeo's driver and was deeply involved in the Crew's loansharking activities. He maintained his own stable of debtors, participated in the division of loansharking profits, accompanied DeMeo and Fred DiNome when they collected loansharking debts, and directly threatened one of the bor-

rowers in connection with a loan made by DeMeo. Pet. App. 31; Gov't C.A. Br. 9, 42-43.

2. In the first trial of Testa and Senter, the jury failed to reach agreement and the court declared a mistrial on charges that Testa and Senta conspired, in violation of 18 U.S.C. 241, to violate the right of Falcaro and Daoud (the competitors in the cars-to-Kuwait venture) to be witnesses in a federal proceeding. The jury, however, convicted co-defendant Ustica on that charge. Pet. App. 35-36. On appeal, the court of appeals reversed Ustica's Section 241 conviction on the ground that the government had failed to prove that Falcaro and Daoud were United States citizens. *United States* v. *Gaggi*, 811 F.2d 47, 58 (2d Cir.), cert. denied, 483 U.S. 1007 (1987).[2]

Prior to the instant trial, Testa and Senter argued that, in light of the reversal of Ustica's conviction on grounds of insufficiency of the evidence, the Double Jeopardy Clause barred their retrial on the Section 241 count. The district court denied their motion, Pet. App. 54-71, and petitioners took an interlocutory appeal. The court of appeals affirmed in reliance on *Richardson* v. *United States*, 468 U.S. 317 (1984). The court explained that even if the opinion in Ustica's case showed that the evidence at the first trial was insufficient to support conviction, the Double Jeopardy Clause does not bar the retrial of petitioners following their mistrial for a hung jury. Pet. App. 48-51.

3. On appeal following their convictions, petitioners raised a variety of claims. First, petitioners ar-

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[2] After both sides had rested their cases in the district court, the government moved to reopen its direct case for the purpose of introducing into evidence the American birth certificate of Falcaro. The district court denied the motion. Pet. App. 40.

gued that the length and complexity of the trial violated their rights under the Due Process Clause. In rejecting that claim, the court of appeals stated that a lengthy trial, involving a large number of defendants and charges, does not violate due process "without a showing that the issues were actually beyond the jury's competence." The court concluded that "[n]o such showing was made in the instant matter." Pet. App. 5-6.

Second, petitioners Testa and Senter contended that their convictions under 18 U.S.C. 241 were defective in that the government failed to prove that they acted with intent to interfere with Falcaro's right to be a federal witness.[3] The court of appeals held that, in order to prove a violation of Section 241, it was not necessary for the government to show that petitioners knew that Falcaro had a right to be a witness in a federal proceeding or that "Falcaro was actually likely to become specifically a federal witness." Pet. App. 13. Rather, the court stated that the government need show only that petitioners knew of facts implicating them in a federal crime (whether or not they knew of its federal status); that Falcaro possessed evidence incriminating them; and that petitioners took steps to interfere with Falcaro's testifying about that evidence (whether or not there was imminent contact between Falcaro and federal authorities). The court then found that each of those elements was satisfied here. *Id.* at 13-14.

Third, the court of appeals rejected petitioner Rega's claim that the government failed to establish that his extortion had the requisite effect on inter-

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[3] At the second trial, the government dropped the charge that Testa and Senter had violated Daoud's civil rights, since Daoud was not a United States citizen. Gov't C.A. Br. 143-144.

state commerce under the Hobbs Act, 18 U.S.C. 1951. The court held that the necessary impact on commerce was shown because Rega's extortion allowed him to acquire the building in which his uncle's film business was located, which "contain[ed] other tenants engaged in interstate commerce." In addition, the court observed, Rega's uncle's "film business itself was capable of revival." Pet. App. 22.

Fourth, Rega contended that the admission of Fred DiNome's prior testimony implicating him in the murder of his uncle violated the hearsay rule and the Confrontation Clause. The court of appeals held that the testimony was admissible because it satisfied the requirements of the exception to the hearsay rule for statements against penal interest by an unavailable witness, Fed. R. Evid. 804(b)(3). Pet. App. 24. As for Rega's confrontation claim, the court held that "[b]ecause the penal interest exception * * * is a 'firmly rooted' one, * * * and the essence of DiNome's testimony was corroborated by other evidence, including Rega's own post-arrest statements, admission of that testimony did not violate Rega's Sixth Amendment rights." *Id.* at 25.

Fifth, the court of appeals rejected Rega's claim that he was denied effective assistance of counsel as a result of the representation afforded him by his first court-appointed attorney. Observing that Rega's first court-appointed attorney was replaced by a second court-appointed attorney at a point in the trial when only a small portion of completed testimony related to Rega, and that the second court-appointed attorney had conducted a "vigorous defense," the court concluded that any ineffectiveness in the performance of the first court-appointed attorney did not affect the outcome of the trial. Pet. App. 27-28.

Sixth, Profeta contended that his loansharking conspiracy and RICO convictions should be reversed because of evidentiary errors and because the evidence was insufficient to support those convictions. The court of appeals took note of the government's concession that in the case of two loans "there was insufficient evidence to establish that, viewed in isolation, the loans were extortionate." The court held, however, that reversal was not required given "the abundant evidence concerning Profeta's involvement in the loansharking activities of the DeMeo Crew," which included "participation in the division of loansharking profits and accompanying members of the Crew in collection efforts," as well as "the meager prejudicial effects, if any, of the evidence regarding non-extortionate loans." Based on the same evidence of Profeta's involvement in the Crew's loansharking activities, the court held that Profeta's RICO convictions were supported by the evidence. Pet. App. 31-32.

Finally, Profeta contended that the "pattern of racketeering activity" element of the RICO statute was unconstitutionally vague as applied to him. The court of appeals rejected that claim without discussion. Pet. App. 33.

ARGUMENT

1. Petitioners Testa and Senter contend (91-2060 Pet. 14-19) that the Double Jeopardy Clause barred their retrial on the charge of conspiring to violate Falcaro's civil rights in light of the court of appeals' determination that the evidence at the first trial was insufficient to support the same charge against co-defendant Ustica. The courts below correctly rejected that claim.

A defendant whose conviction is reversed on appeal on the ground that the evidence is not sufficient to support a conviction may not be retried consistent with the Double Jeopardy Clause. See *Burks* v. *United States*, 437 U.S. 1 (1978). It has long been settled, however, that when a mistrial is declared because of the jury's inability to reach a verdict, there is no double jeopardy bar to retrial of the defendant. *Richardson* v. *United States*, 468 U.S. 317, 323-324 (1984); *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). That rule "accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. at 509. In *Richardson*, the Court held that even "if the Government failed to introduce sufficient evidence to establish [a defendant's] guilt beyond a reasonable doubt at his first trial," it is permissible to retry the defendant "following a declaration of a mistrial because of a hung jury." 468 U.S. at 322-323. The Court explained that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [the defendant] was subjected." *Id.* at 326.

Petitioners seek (91-2060 Pet. 15-17) to distinguish *Richardson* by arguing there was an "event" that terminated their original jeopardy—the court of appeals' reversal of Ustica's conviction under 18 U.S.C. 241 based on insufficiency of the evidence. But that reversal was an event in Ustica's prosecution, not in petitioners'. Petitioners' jeopardy was not terminated by the disposition of Ustica's case, regardless of the appellate court's determination on the sufficiency of the evidence. Here, as in *Richardson*, "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree." *Richardson*, 468 U.S. at 326.

There is no relevant difference between petitioners and any other defendant whose trial ends in a deadlocked jury; whether or not the defendant in such a case would have had a valid sufficiency-of-the-evidence objection, his retrial does not offend the Double Jeopardy Clause. The fortuity that one of petitioners' co-defendants was convicted by the jury and prevailed before the court of appeals on insufficiency grounds does nothing "to uproot [the] settled line of cases" allowing the retrial of petitioners following the discharge of *their* hung jury. *Richardson*, 468 U.S. at 324.

2. Profeta contends (91-8646 Pet. 9-15) that the "pattern of racketeering activity" element of a RICO offense is unconstitutionally vague. He relies on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 254-256 (1989), in which Justice Scalia, joined by three other Justices, expressed doubt about whether the RICO "pattern"

element could withstand a constitutional vagueness challenge.

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975). To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

Congress drafted the RICO statute to cover a wide range of criminal activity, but "[o]rganized crime was without a doubt Congress' major target." *H.J. Inc.*, 492 U.S. at 245. Given RICO's central purpose of combatting organized crime, persons of ordinary intelligence have ample notice that the statute reaches the commission of repeated criminal acts—such as the loansharking conspiracies in which Profeta engaged —that are aimed at furthering the goals of an organized crime family. As the Third Circuit recently stated in rejecting a similar claim, "application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful vagueness challenge to RICO could ever be raised by defendants in an organized crime case." *United States* v. *Pungitore*, 910 F.2d 1084, 1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991).

Profeta argues that he lacked fair notice that his conduct satisfied the "relatedness" aspect of RICO's pattern requirement. See *H.J. Inc.*, 492 U.S. at 239-240 ("to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity"). The courts have uniformly held that the requisite relatedness of predicate acts is established when each act furthers the goals of the same criminal enterprise. See *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 449 U.S. 871 (1980). In this case, the evidence showed that loansharking was a mainstay of the DeMeo Crew, and that Crew members frequently called on one another to assist in the collection of extortionate loans. True to that pattern, each of the loans at issue was either made by Profeta and collected with the help of one or more Crew members, or made by another Crew member and collected with Profeta's help. Since the loansharking offenses committed by Profeta advanced the cause of a single organized crime family, there can be no serious contention that he lacked notice that he was subject to RICO liability for his conduct.

3. Rega contends (91-8670 Pet. 11-30) that the admission of Fred DiNome's grand jury testimony concerning the Todaro murder violated the Confrontation Clause. DiNome testified before the grand jury pursuant to a cooperation agreement that bound him to plead guilty to a RICO violation, to answer the government's inquiries concerning his and others' activities truthfully, and to testify truthfully about

those activities. See Gov't C.A. Br. 163. The district court admitted only three brief excerpts (totalling less than a page) from DiNome's grand jury testimony concerning the Todaro murder. In those excerpts DiNome admitted his role in the murder, stated that he had met Rega, and further stated that he saw Rega pay $10,000 to DeMeo shortly after the murder. The testimony about the payment was admitted after the trial judge found that it corroborated Rega's post-arrest admission of the fact and timing of the payment, which Rega asserted was for a pre-existing debt.[4] See Gov't C.A. Br. 162, 168-169.

The admission of a hearsay statement satisfies reliability concerns under the Confrontation Clause when the statement bears adequate "indicia of reliability." *Idaho* v. *Wright*, 110 S. Ct. 3139, 3146 (1990), quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Reliability can be inferred without more when the evidence falls within a "firmly rooted" hearsay exception. *Wright*, 110 S. Ct. at 3146; *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992). The exception to the hearsay rule for statements against the declarant's penal interest, Fed. R. Evid. 804(b)(3), was the exception used to admit DiNome's grand jury testimony at trial. Gov't C.A. Br. 168. That exception is sufficiently established in American law to satisfy reliability concerns under the Confrontation Clause. *E.g.*, *United States* v. *Taggart*, 944 F.2d 837, 840

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[4] The district court refused to admit those portions of DiNome's grand jury testimony in which DiNome stated that Rega had had Todaro killed, that Rega did so in connection with a property dispute, and that Rega paid DeMeo $10,000 for murdering Todaro. Gov't C.A. Br. 169.

(11th Cir. 1991); *United States* v. *Seeley*, 892 F.2d 1, 2 (1st Cir. 1989).[5]

Petitioner nevertheless challenges the reliability of DiNome's statements for confrontation purposes. First, he contends that the court of appeals' holding that the statements were reliable conflicts with *Idaho* v. *Wright*, *supra*. In *Wright*, the Court considered the requirements for establishing reliability when a hearsay statement does *not* fall within a firmly rooted exception. The Court held that reliability can be inferred in such a case if the statement has "particularized guarantees of trustworthiness" drawn from the circumstances surrounding the making of the statement itself, without regard to corroborating evidence. 110 S. Ct. at 3149-3150. Petitioner argues (91-8670 Pet. 13-15) that the court of appeals' ruling conflicts with *Wright* because the court took into consideration the evidence that corroborated DiNome's out-of-court statement. The court of appeals, however, relied on the fact that the exception for declarations against penal interest is firmly rooted. Pet. App. 25. The court's additional comment, *ibid.*, that DiNome's statement was corroborated by Rega's admission concerning the $10,000 payment appears to reflect no more than the court's conclusion that the ex-

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[5] In *Lee* v. *Illinois*, 476 U.S. 530, 544 n.5 (1986), the Court stated that the general concept of declarations against penal interest constitutes "too large a class for meaningful Confrontation Clause analysis." That case, however, did not involve statements that were admitted pursuant to a specific hearsay exception. Four Members of the Court expressed the view that "[t]he hearsay exception for declarations against [penal] interest is firmly established." *Id.* at 551 (Blackmun, J., joined by Chief Justice Burger, and Justices Powell and Rehnquist, dissenting). The majority opinion did not reject that view, since the evidence in *Lee* was not introduced under that hearsay exception.

ception was satisfied on the facts of this case. See *United States* v. *Casamento*, 887 F.2d 1141, 1170 (2d Cir. 1989) (noting the circuit's requirement of corroboration under Rule 804(b)(3) "even when the [hearsay] statement is offered * * * to *inculpate* the accused"), cert. denied, 493 U.S. 1081 (1990). Moreover, if it were necessary to rely on particularized guarantees of trustworthiness to admit the testimony, such guarantees exist quite apart from the corroborating evidence from petitioner.[6] Petitioner's reliance (91-8670 Pet. 12-13) on *Lee* v. *Illinois*, 476 U.S. 530 (1986), is also misplaced. There, the Court found a violation of the Confrontation Clause when the declarant's confession was admitted solely on the supposition that it was reliable because it partially "interlocked" with the defendant's confession; here, however, the statements were admitted because they fell within a firmly rooted hearsay exception.

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[6] The reliability of DiNome's testimony was supported by the fact that counsel was available to advise him; he was not threatened or improperly influenced; DiNome did not place Rega at the scene of the murder, although he could have done so if he had intended to fabricate; and under the cooperation agreement, false testimony would have subjected DiNome not only to prosecution for perjury but also to liability for any crime disclosed by his cooperation—a sentencing exposure in excess of 200 years. See Gov't C.A. Br. 173-175. Rega argues (91-8670 Pet. 22) that an accomplice's statements to authorities are unreliable because he may well desire to curry favor with the government. While DiNome's cooperation agreement gave him an incentive to testify, it did not give him an incentive to lie. See *United States* v. *Guinan*, 836 F.2d 350, 355 (7th Cir.) ("it does not follow that any motive for volunteering to testify other than a pristine sense of civic duty is also an incentive to manufacture *false* testimony"), cert. denied, 487 U.S. 1218 (1988). To the contrary, the severe penalty for false testimony under the agreement acts to deter lies.

Second, Rega argues (91-8670 Pet. 20) that Fed. R. Evid. 804(b)(3) does not apply here because DiNome's testimony concerning the $10,000 payment was collateral to his self-incriminating statements. But, as the court of appeals observed, Pet. App. 24-25, the testimony concerning the payment was "part of a colloquy discussing DiNome's own participation in a murder," and it "explained DiNome's motive in helping to dispose of the body." Rule 804(b)(3) does not " 'constrict the scope of a declaration against interest to the point of excluding collateral material that * * * actually tend[s] to fortify the statement's disserving aspects.' " *United States* v. *Brainard*, 690 F.2d 1117, 1124 (4th Cir. 1982), after remand, 745 F.2d 320 (1984), cert. denied, 471 U.S. 1099 (1985), quoting *United States* v. *Barrett*, 539 F.2d 244, 252 (1st Cir. 1976). Here, as in *United States* v. *Garris*, 616 F.2d 626, 630 (2d Cir.), cert. denied, 447 U.S. 926 (1980), the challenged statement was admissible under Rule 804(b)(3) because it was "integral to a larger statement which [was] against the declarant's interest." See also *United States* v. *Casamento*, 887 F.2d at 1171; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 804(b)(3)[02], at 136-138 (1988) (admitting portions of the statement closely connected to the declaration against interest is the approach "best calculated to carry out the design of the draftsmen of Rule 804(b)(3)").[7]

Even assuming the admission of DiNome's testimony about the payment was error, it was plainly

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[7] Rega also asserts (91-8670 Pet. 24-30) that the circuits are in conflict over the proper approach to admitting grand jury testimony. The cases cited by Rega, however, do not involve the exception for declarations against penal interest found in Rule 804(b)(3), but instead involve the residual exception to the hearsay rule found in Fed. R. Evid. 804(b)(5).

harmless. There was a wealth of evidence from unchallenged sources (including from DiNome's plea allocution, Gov't C.A. Br. 168) about the context and circumstances of the murder, and Rega admitted making a roughly contemporaneous payment to DeMeo. That evidence fully supported the inference that Rega was compensating DeMeo for the murder.[8]

4. Testa, Senter, and Rega contend (91-2060 Pet. 19-22; 91-8670 Pet. 45-52) that the length and complexity of the trial, resulting from the joinder of ten defendants, violated their right to due process of law. The court of appeals correctly rejected that claim.

It is well settled that defendants who are indicted together ordinarily should be jointly tried. That rule furthers judicial economy and the convenience of victims and witnesses, and it helps to avoid inconsistent verdicts and unfair advantages to defendants who are tried later. See *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987). Here, a joint trial of the ten defendants was especially appropriate, since virtually all of the prosecution's evidence admitted at the joint trial would have been admissible at separate trials to prove the existence and nature of the RICO enterprise.

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[8] Rega's invocation (91-8670 Pet. 30-31) of the Fifth Amendment is misplaced. "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991), quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). When evidence is admitted pursuant to a firmly rooted hearsay exception, it is viewed as "so trustworthy that adversarial testing can be excepted to add little to its reliability." *White* v. *Illinois*, 112 S. Ct. at 743. Even if the Due Process Clause could conceivably be violated by the admission of such evidence, petitioner offers no basis for concluding that this is such a case.

Petitioners offer no reason to believe that the district court abused its discretion in holding a joint trial here. First, petitioners vastly overstate the length and complexity of the trial. Although the trial spanned approximately 16 calendar months, its actual length, from opening statements to final verdict, was 152.5 days or (measured by a five-day week) seven months. See Gov't C.A. Br. 71.[9] The crimes charged were "rather ordinary in nature, except in their viciousness," Pet. App. 6, and the evidence was straightforward, consisting chiefly of direct testimony, mostly from accomplices. The legal concepts presented to the jury were not difficult to understand, and the jury required no "subtlety of analysis" to reach a verdict. *Ibid.*

Moreover, other factors strengthen the conclusion that the length and complexity of the trial did not hinder the jury's ability to reach a fair verdict. The district court repeatedly instructed the jury to give each defendant and each charge individualized attention; the district court permitted the jurors to take notes throughout the trial and provided each juror with an outline of the elements of each offense; the jury requested testimony of 48 witnesses by name to be read back, and it asked to review 25 exhibits by their exhibit number; the jury spent 12 days in deliberation before announcing its verdicts; and there was no "concrete evidence of unusual juror confusion." Pet. App. 6; Gov't C.A. Br. 74-77. So impressed was Profeta's counsel by the jury's performance that he observed on the record that "[t]his jury has shown that they are extremely conscientious and

[9] The jury sat only three and one-half days per week, and for more than 112 days the jury either did not sit or did not hear evidence. Gov't C.A. Br. 71.

are going through this deliberation in painstaking detail." Gov't C.A. Br. 77.

As the court of appeals concluded, Pet. App. 5, petitioners failed to show that the length or complexity of the trial prevented the jury from competently performing its function. In the absence of such a showing, "[t]here is no support in caselaw or in logic for the proposition that a lengthy trial, a large number and variety of charges, and numerous defendants violate due process." [10]

5. Testa and Senter contend (91-2060 Pet. 8-14) that their conviction under 18 U.S.C. 241 for conspiring to violate Falcaro's civil right to be a witness in a federal proceeding should be reversed. They urge that the evidence failed to show either that a federal proceeding at which Falcaro might testify was actually pending, or that they believed that such a proceeding might be initiated.

Section 241 protects, *inter alia*, the right of a citizen to be a witness in a federal proceeding. *United States* v. *Guzzino*, 810 F.8d 687 (7th Cir.), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Guillette*, 547 F.2d 743, 748 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977). That right does not depend on the existence of a pending federal proceeding or on an individual's announcing his intention to become a witness; instead, the right is acquired when a person comes into possession of information relating to a federal crime, thereby becoming a potential

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[10] While some courts have expressed misgivings about so-called "mega-trials," see *United States* v. *Casamento*, 887 F.2d at 1151; *United States* v. *Kopituk*, 690 F.2d 1289, 1320 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); *United States* v. *Martino*, 648 F.2d 367, 385 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982), none of those cases reversed a conviction because of the length and complexity of the trial.

federal witness. See *United States* v. *Harvey*, 526 F.2d 529, 535 n.6 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976). Under a contrary rule, a defendant could avoid liability under Section 241 merely by arranging to murder the witness before the witness reports the crime to federal authorities.

Testa and Senter argue (91-2060 Pet. 9-11) that the government was required to prove that they at least feared that a federal prosecution would be brought against them. They assert that the government failed to do that, because the evidence showed only that they believed Falcaro might testify against them at a potential *state* proceeding.

This Court has stated that to obtain a conviction under Section 241 the government must show that the defendant acted with a "specific intent to interfere with the federal right." *United States* v. *Guest*, 383 U.S. 745, 760 (1966). That specific intent requirement is satisfied if the conspirators intended to commit acts that would deprive a citizen of a federal right, regardless of whether the conspirators knew that the right that they were violating was protected by federal law. See *Guzzino*, 810 F.2d at 696 n.11; *United States* v. *Barker*, 546 F.2d 940, 945 (D.C. Cir. 1976); *United States* v. *O'Dell*, 462 F.2d 224, 232 n.10 (6th Cir. 1972). Cf. *United States* v. *Yermian*, 468 U.S. 63 (1984) (in prosecution for making false statements in matter within jurisdiction of federal agency, no need to prove defendant knew of federal agency jurisdiction); *United States* v. *Feola*, 420 U.S. 671 (1975) (in prosecution for assaulting a federal officer, no need to prove defendant knew that assault victim was a federal officer). Accordingly, it was sufficient that the government showed that petitioners sought to interfere with Falcaro's right to inform law

enforcement authorities of a crime, even if they did not know that he was a potential federal witness.

In any event, even if the government were required to prove that Testa and Senter knew Falcaro to be a potential federal witness, the evidence satisfied that requirement. Petitioners murdered Falcaro in order to prevent him from giving information to law enforcement officials about their scheme involving stealing cars in Brooklyn, transporting them to the docks in Newark, and shipping them to Kuwait. Although the theft of the cars is a state crime, the international dimension of petitioner's operation made it a matter of federal concern. Because petitioners' crimes were plainly subject to federal prosecution, the jury was entitled to infer that petitioners killed Falcaro at least in part because he was a potential federal witness.

6. Rega contends (91-8670 Pet. 32-45) that the evidence was insufficient to support his Hobbs Act conviction because it failed to show that his extortionate acquisition of his uncle's building and film business affected interstate commerce. That fact-bound question warrants no further review.

The Hobbs Act provides that the government need show only that the extortionate conduct affected interstate commerce "in any way or degree." 18 U.S.C. 1951. As this Court has observed, that language "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion." *Evans* v. *United States*, 112 S. Ct. 1881, 1887 n.12 (1992), quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Accordingly, the Hobbs Act requires only a "minimal" effect on interstate commerce. See *United States* v. *Wright*, 804 F.2d 843, 844 (5th Cir. 1986); *United States* v.

Daley, 564 F.2d 645, 649 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978).

Petitioner asserts that commerce could not have been affected by his extortionate conduct because, at the time the conduct occurred, his uncle's film processing business was inactive. As the court of appeals explained, however, the commerce requirement of the Hobbs Act was satisfied by the evidence that before Rega converted the building to residential apartments, it contained commercial tenants who engaged in interstate transactions. Pet. App. 22. There can be no doubt that an extortionate scheme to acquire a building containing commercial tenants with the purpose of displacing those tenants and converting the building to a residential cooperative affects interstate commerce. The court of appeals also correctly found that even if Rega's uncle's film processing business was inactive at the time of petitioner's offense, it was capable of being revived. *Ibid.* Accordingly, Rega's acquisition of the business had a potential effect on interstate commerce, which is enough to satisfy the Hobbs Act. See *United States* v. *Staszcuk*, 517 F.2d 53, 60 (7th Cir.), cert. denied, 423 U.S. 837 (1975); *United States* v. *Augello*, 451 F.2d 1167, 1169-1170 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972); *Hulahan* v. *United States*, 214 F.2d 441, 445 (8th Cir. 1954).[11]

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[11] The cases cited by Rega (91-8670 Pet. 36-38) do not support his contention that there was no effect on commerce because his uncle's business was inactive. For the most part, those cases turned on whether a particular *ongoing* business or activity had a sufficient connection with interstate commerce, or on whether the commercial element of a Hobbs Act violation may be manufactured by federal agents. None of the cases considered extortionate conduct aimed at an inactive

7. Rega contends (91-8670 Pet. 52-55) that he received ineffective assistance of counsel from Robert Heaphy, his first court-appointed attorney. Heaphy represented Rega at the beginning of the trial, but was subsequently replaced by attorney Lawrence Schoenbach, who represented Rega for the balance of the trial. See Gov't C.A. Br. 229-230.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness, and that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). The reviewing court's central concern is discerning "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process." *Id.* at 696.

The court of appeals assumed for purposes of applying the *Strickland* test that Heaphy's performance was ineffective. Pet. App. 27. It concluded, however, that in light of Schoenbach's appointment at a time when very little of the government's case against Rega had been presented, and in light of Schoenbach's subsequent vigorous defense of Rega,[12] Heaphy's errors did not have any prejudicial impact on the trial. Pet.

(but formerly commerce-connected) business that is capable of revival.

[12] The best evidence of Schoenbach's effectiveness is that he put on by far the most extensive defense case in the trial. While two of the other defendants called one witness each, and the remaining six defendants called none, Schoenbach called 14. Gov't C.A. Br. 237.

App. 27-28. That case-specific determination is correct and does not warrant this Court's review.

Rega argues (91-8670 Pet. 54) that he was deprived of his right to counsel as a result of Heaphy's failure to procure certain discovery material and to effectively cross-examine government witnesses. Schoenbach's zealous advocacy more than compensated for any such deficiencies in Heaphy's performance. Thus, any documents that Heaphy failed to request of the government were available to Schoenbach, who obtained them, used them in his examination of witnesses, and introduced many of them into evidence. Gov't C.A. Br. 237. And had Schoenbach wished to cross-examine again the two government witnesses whom Heaphy cross-examined,[13] he was free to recall them during the defense case, or to ask the court for an opportunity to recall them during the government's case. Because Schoenbach showed himself ready to recall witnesses when necessary, see *ibid.*, it can safely be concluded that his decision not to recall the two witnesses was a tactical choice resting on his assessment of the importance of the witnesses and the extent to which other defense counsel had already impeached their credibility. In short, because Schoenbach's performance cured any prejudice to Rega caused by Heaphy's performance, Rega was not denied the effective assistance of counsel.[14]

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[13] Heaphy had only begun to cross-examine a third government witness when the district court adjourned the trial and appointed Schoenbach. Schoenbach resumed the cross-examination two months later, when the witness was available to reappear. Gov't C.A. Br. 237. Rega does not contend that Schoenbach's cross-examination of the witness was ineffective.

[14] Rega also argues (91-8670 Pet. 54) that he was prejudiced by Heaphy's failure to present a theory of defense in

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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his opening statement. Rega failed, however, to make that argument in the court of appeals and thereby waived it. In any event, Heaphy's opening statement, in which he asserted Rega's innocence and attacked the credibility of the principal witness against Rega, was not so ineffective as to alter the result of the trial.

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